

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of Time Warner Cable Inc. for)	WC Docket No. 13-204
Preemption Pursuant to Section 252(e)(5) of)	
the Communications Act, as Amended, of the)	
North Carolina Rural Electrification Authority)	
for Failure to Arbitrate an Interconnection)	
Agreement with Star Telephone Membership)	
Corporation)	

COMMENTS OF STAR TELEPHONE MEMBERSHIP CORPORATION

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September 6, 2013

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I. INTRODUCTION AND SUMMARY

Star Telephone Membership Corporation (“Star”) hereby submits these comments in opposition to Time Warner Cable Inc.’s¹ (“Time Warner”) Petition for Preemption of the North Carolina Rural Electrification Authority’s (“NCREA” or “Authority”) jurisdiction pursuant to Section 252(e)(5) of the Communications Act of 1934 (“Act”) for failure to arbitrate an interconnection agreement between Time Warner and Star.²

The Commission should deny Time Warner’s Preemption Petition for two reasons. *First*, Time Warner has failed to carry its burden of demonstrating that the NCREA has failed to act on Time Warner’s petition for arbitration. The Authority has been diligently working to resolve all of the issues presented in Time Warner’s petition for arbitration. Since 2006, the NCREA has issued 25 orders related to Time Warner’s petition. In particular, the NCREA has consolidated Time Warner’s petition for arbitration with Star’s Section 251(f)(2) petition to work toward an

¹ Time Warner Cable Inc. petitions on behalf of Time Warner Cable Information Services (North Carolina) LLC. This comment will refer to both entities as “Time Warner” throughout.

² *Petition of Time Warner Cable Inc. for Preemption Pursuant to Section 252(e)(5) of the Communications Act, as Amended, of the North Carolina Electrification Authority for Failure to Arbitrate an Interconnection Agreement with Star Telephone Membership Corporation*, Petition for Preemption, WC Docket No. 13-204 (Aug. 8, 2013) (“Preemption Petition”).

orderly resolution of both petitions. Time Warner attempts to blame the NCREA for the delay in reaching a final determination, but Time Warner has frustrated the NCREA's ability to arbitrate the parties' underlying interconnection dispute because it has chosen a strategy of confrontation rather than cooperation. The Commission should not reward Time Warner's gamesmanship and forum shopping when much of the delay is attributable to Time Warner.

Second, the NCREA reasonably decided to proceed with Star's petition for suspension or modification of its interconnection obligations under Section 251(f)(2) before resolving Time Warner's arbitration petition. Star's suspension petition presents important predicate issues that must be resolved before the NCREA can even begin to arbitrate an interconnection agreement. Indeed, a favorable ruling on Star's suspension petition could moot altogether Time Warner's petition for arbitration. The NCREA reasonably interpreted the Commission's prior rulings and controlling law to determine that proceeding in two phases—considering the suspension petition first, and then resolving any remaining interconnection issues in the arbitration proceeding—was the most efficient way to resolve the underlying dispute.

II. BACKGROUND

A. Statutory Framework

Section 251 of the Act, as amended, establishes the interconnection obligations of telecommunications carriers.³ Section 251(a) describes the duties of all telecommunications carriers,⁴ while Section 251(b) describes the obligations of all local exchange carriers ("LECs"),⁵ and Section 251(c) describes additional obligations reserved for incumbent local exchange

³ 47 U.S.C. § 251.

⁴ *Id.* § 251(a) ("Each telecommunications carrier has the duty (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and (2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.").

⁵ *Id.* § 251(b) ("Each local exchange carrier has the following duties: [(1) resale; (2) number portability; (3) dialing parity; (4) access to rights-of-way; (5) reciprocal compensation].").

carriers (“ILECs”).⁶ Section 252 of the Act requires state commissions to arbitrate certain interconnection disputes and to “conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.”⁷ In conducting arbitrations, state commissions have the flexibility to “consolidate proceedings . . . in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities.”⁸ But if the state commission “fails to . . . carry out its responsibility” under Section 252, the aggrieved party may petition the FCC, and “the [FCC] shall issue an order preempting the State commission’s jurisdiction of that proceeding or matter” and “assume the responsibility of the State commission . . . with respect to the proceeding or matter and act for the State commission.”⁹

Under Sections 251(f)(1) and (f)(2), rural telephone companies, like Star, may be exempted from some of these interconnection duties in two ways. Under 251(f)(1), rural telephone companies are generally exempt from all Section 251(c) interconnection-related duties until the company has received a “bona fide request for interconnection” and “the State commission determines . . . that such request is not unduly economically burdensome” and “is technically feasible.”¹⁰ Under 251(f)(2), rural carriers “with fewer than 2 percent of the Nation’s subscriber lines installed in the aggregate nationwide” may petition their state commission for a

⁶ *Id.* § 251(c) (“In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties: [(1) to negotiate in good faith; (2) to interconnect with any requesting telecommunications carrier; (3) to provide any requesting telecommunications carrier with unbundled access; (4) to offer telecommunications services for resale at wholesale rates; (5) to provide reasonable public notice of changes affecting interoperability; and (6) to provide just, reasonable, and nondiscriminatory terms, rate, and conditions for collocation].”).

⁷ *Id.* § 252(b)(4)(C).

⁸ *Id.* § 252(g).

⁹ *Id.* § 252(e)(5).

¹⁰ *Id.* § 251(f)(1).

“suspension or modification” of a requirement or requirements of [Section 251 subsections (b) or (c)].¹¹ The statute mandates that the state commission shall grant a petition under Section 251(f)(2) “to the extent that, and for such duration as” such suspension or modification is necessary “(i) to avoid a significant adverse economic impact on users of telecommunications services generally; (ii) to avoid imposing a requirement that is unduly economically burdensome; or (iii) to avoid imposing a requirement that is technically infeasible” and that is “consistent with the public interest, convenience, and necessity.”¹² Further, pending action on a Section 251(f)(2) petition the state commission may “suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier.”¹³

The intersection of the suspension mechanism in Section 251(f) and the arbitration provisions of Section 252 has caused confusion in the past. In its 2011 *CRC Declaratory Ruling*, the FCC clarified that “LECs are obligated to fulfill all of the duties set forth in sections 251(a) and (b) of the Act, including the duty to interconnect and exchange traffic, even if the LEC has a rural exemption [under 251(f)(1)] from the obligations set forth in section 251(c).”¹⁴ It also specified that “the rural incumbent LECs’ obligations under sections 251(a) and (b) can be implemented through the state commission arbitration and mediation provisions in section 252.”¹⁵ However, the FCC declined to “address obligations associated with section 251(a) in isolation,” and limited its decision to state commission arbitration petitions “where issues relating to [petitions where both 251(a) and 251(b)] obligations are implicated in the same

¹¹ *Id.* § 251(f)(2).

¹² *Id.*

¹³ *Id.* § 251(f)(2)(B).

¹⁴ *Petition of CRC Communications of Maine Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended*, Declaratory Ruling, WC Docket 10-143, GN Docket 09-51, CC Docket No. 01-92, Rel. No. FCC 11-83, 26 FCC Rcd. 8259, ¶ 2 (Rel. May 26, 2011) (“*CRC Declaratory Ruling*”).

¹⁵ *Id.*

request for interconnection.”¹⁶ In addition, the Commission recognized that small telephone companies retained the right to petition for relief from Section 251(b) and (c) obligations under 251(f)(2).¹⁷

B. Procedural History

Time Warner requested interconnection with Star on October 5, 2005 when it sought “rights under Sections 251(a), (b), and (c) of the Communications Act: interconnection, number portability, dialing parity, access to rights of way, reciprocal compensation, and collocation.”¹⁸ At that time, Star declined to negotiate an interconnection agreement with Time Warner based on its understanding of its Section 251 interconnection obligations to apply only to telecommunications carriers.

On March 14, 2006, Time Warner petitioned the NCREA to terminate Star’s rural exemption pursuant to Section 251(f)(1) of the Act and to arbitrate an interconnection agreement between Time Warner and Star pursuant to Section 252.¹⁹ On April 10, 2006, Star filed a motion to dismiss,²⁰ which the NCREA granted as to Time Warner’s petition for arbitration on July 19, 2006.²¹ A year and a half later, on December 17, 2007, Time Warner moved for reconsideration of the NCREA’s Order granting dismissal of its petition.²² On March 24, 2008, the NCREA

¹⁶ *Id.* ¶ 21.

¹⁷ *CRC Declaratory Ruling*, n.49 (“We note, of course, that carriers might obtain relief from the section 251(b) obligations in some instances pursuant to section 251(f)(2).”).

¹⁸ Preemption Petition, Ex. 1, Attachment 1, Letter from Time Warner to Star (Oct. 5, 2005). Time Warner later described itself as seeking interconnection pursuant to 251(a) generally and establishment of arrangements for number portability, dialing parity, access to rights of way, and reciprocal compensation pursuant to Section 251(b). Preemption Petition, Ex. 1, Time Warner Petition for Arbitration (Mar. 14, 2006).

¹⁹ *Id.*

²⁰ Preemption Petition, Ex. 2, Star Motion to Dismiss (Apr. 10, 2006).

²¹ Preemption Petition, Ex. 3, NCREA Order (July 19, 2006).

²² Preemption Petition, Ex. 4, Time Warner Request for Reconsideration (Dec. 17, 2007).

denied Time Warner's request for reconsideration.²³ Time Warner appealed the NCREA's decision, and in September 2009 the U.S. District Court for the Eastern District of North Carolina remanded the matter to the NCREA for further consideration.²⁴

On remand, the NCREA directed that an arbitrator be appointed and that the docket proceed in two phases.²⁵ The first phase would determine "whether Star's rural exemption [pursuant to Section 151(f)(1)] should be terminated."²⁶ Then, "[s]hould the Authority determine that Star's rural exemption should not be terminated no further proceeding will be necessary regarding [Time Warner's] Petition for Arbitration."²⁷ However, in light of the FCC's *CRC Declaratory Ruling*, which clarified Star's Sections 251(a) and (b) interconnection obligations under Section 251(f)(1), the NCREA, as recommended by the arbitrator, terminated Phase I of the proceeding on January 31, 2012.²⁸

Subsequently, Star petitioned the NCREA for suspension or modification of its obligations under Sections 251(b) and (c) pursuant to Section 251(f)(2).²⁹ Star argued that its "economic health, its ability to continue to meet its universal service obligations, and its continued ability to provide excellent service at reasonable rates" would be compromised by interconnection with telecommunication providers that "selectively serve[] customers" within its footprint.³⁰ Time Warner moved to dismiss Star's suspension petition.³¹ On March 28, 2012,

²³ Preemption Petition, Ex. 5, NCREA Order (Mar. 24, 2008).

²⁴ *Time Warner Cable Info. Serv. (North Carolina), LLC v. Duncan*, 656 F. Supp. 2d 565 (E.D.N.C. 2009).

²⁵ Preemption Petition, Ex. 6, NCREA Order (Jan. 27, 2010).

²⁶ *Id.* at 5.

²⁷ *Id.*

²⁸ Preemption Petition, Ex. 9, NCREA Order (Jan. 31, 2012).

²⁹ Preemption Petition, Ex. 10, Star Petition for Suspension or Modification (Feb. 29, 2012).

³⁰ *Id.* at 6-7.

³¹ Preemption Petition, Ex. 11, Time Warner Motion to Dismiss (Mar. 23, 2012).

the NCREA consolidated Star's suspension petition with Time Warner's petition for arbitration, pursuant to its authority in Section 252(g).³² The NCREA retained its phased approach to evaluating the competing petitions in this matter, saying: "The Authority finds that the resolution of Star's Petition should be completed prior to proceeding to Phase II, arbitration regarding an Interconnection Agreement between [Time Warner] and Star. . . . After the exceptions [to the arbitrator's decision on Star's 251(f)(2) petition] are filed and oral argument is held, the Authority will make a final determination regarding Star's Petition and whether the parties are to proceed to Phase II [arbitration of the interconnection agreement]."³³

The arbitrator recommended that the NCREA grant Time Warner's motion to dismiss Star's 252(f)(2) petition.³⁴ After considering the parties' objections and comments, the NCREA determined that Star had "sufficiently pled the elements necessary to request suspension or modification pursuant to [Section 251(f)(2)]."³⁵ It reiterated that the interconnection proceedings would proceed in two phases. First, the arbitrator would consider Star's 252(f)(2) petition, and the NCREA would make a final determination on that petition. Then, the matter would proceed to Phase II "[s]hould the Authority determine that Star's 47 U.S.C. § 251(b) obligations should not be suspended or modified."³⁶ If, at that time, Star and Time Warner "are unable to agree to the terms and conditions of an interconnection agreement, a Petition will be filed with the

³² Preemption Petition, Ex. 12, NCREA Order (Mar. 28, 2012); 47 U.S.C. § 252(g) (providing that proceedings under Sections 251 and 252 can be consolidated to "reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under the Act.")

³³ *Id.* at 2.

³⁴ Preemption Petition Ex. 13, Recommended Order Granting Time Warner Motion to Dismiss (Oct. 25, 2012).

³⁵ Preemption Petition Ex. 14, NCREA Order, 3 (Apr. 2, 2013).

³⁶ *Id.* at 4

Authority requesting arbitration for the disputed issues.”³⁷ Time Warner requested that the NCREA reconsider this Order,³⁸ but the NCREA declined to do so.³⁹ Time Warner subsequently petitioned the Commission to preempt the NCREA’s jurisdiction over this matter and arbitrate the interconnection agreement between Time Warner and Star pursuant to Section 252(e)(5).⁴⁰

III. ARGUMENT

A. **The Commission Cannot Preempt the NCREA’s Jurisdiction Because the NCREA Has Not Failed to Act on Time Warner’s Petition for Arbitration.**

1. **The Commission’s Narrow Interpretation of Section 252(e)(5) Precludes Preemption Under these Circumstances.**

Section 252(e)(5) provides that the FCC “shall issue an order preempting the State commission’s jurisdiction” in an interconnection arbitration “[i]f a [s]tate commission fails to act or carry out its responsibility” under Section 252.⁴¹ “For purposes of [Section 252(e)(5)], a state commission fails to act if the state commission fails to respond, within a reasonable time, to . . . a request for arbitration, as provided for in section 252(b) of the Act, or fails to complete an arbitration within the time limits established in section 252(b)(4)(C) of the Act.”⁴² Preemption of a state commission’s authority to arbitrate interconnection disputes is a “viable option” “only if the state commission either does not respond to a request, or refuses to resolve a particular

³⁷ *Id.*

³⁸ Preemption Petition, Ex. 15, Time Warner Petition for Partial Reconsideration of Order Issued April 2, 2013 (May 3, 2013).

³⁹ Preemption Petition, Ex. 16, NCREA Order (June 10, 2013).

⁴⁰ *See* Preemption Petition.

⁴¹ 47 U.S.C. § 252(e)(5).

⁴² 47 C.F.R. § 51.801.

matter raised in a request.”⁴³ A failure to act “suggests incomplete action or no action, not misguided action.”⁴⁴

The Commission does not take an “expansive view” of what constitutes a state commission’s failure to act and has found a “failure to act” only in a narrow set of circumstances.⁴⁵ In *Starpower*, the FCC found that the Virginia State Corporation Commission “failed to act” under Section 252(e)(5) where the state commission “explicitly declined to take any action” on a petition seeking a declaratory ruling on a party’s obligation to pay reciprocal compensation for delivering traffic to another party’s ISPs, and instead encouraged the parties to seek relief from the FCC.⁴⁶ Likewise, in *Northland Networks*, the FCC found that the New York Commission “expressly declined to interpret or enforce the terms of identical interconnection agreements” when it informed a party to the New York proceeding that it “no longer would resolve contractual disputes between carriers regarding reciprocal compensation for ISP-bound traffic” because “adequate, alternative forums” existed to resolve the dispute.⁴⁷ And, in *WorldCom*, the FCC found the Virginia State Corporation Commission “failed to act” where it refused to arbitrate an interconnection agreement, stating that it “had no authority to waive the

⁴³ *Global NAPS, Inc. v. FCC*, 291 F.3d 832, 837 (D.C. Cir. 2002).

⁴⁴ *Id.*

⁴⁵ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd. 15499, ¶ 1285 (Rel. Aug. 8, 1996).

⁴⁶ *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, Memorandum Opinion and Order, CC Docket No. 00-52, 15 FCC Rcd. 11277, 11280 (¶ 47) (2000).

⁴⁷ *Northland Networks, Ltd. for Preemption of the Jurisdiction of the New York Public Service Commission Pursuant to Section 252(e)(5) of the Communications Act of 1934, as Amended*, Memorandum Opinion and Order, WC Docket No. 03-242, 19 FCC Rcd. 2396, 2398-400 (Rel. Feb. 11, 2004) (citation and quotations omitted).

Commonwealth's sovereign immunity" by acting in such a way that would open the Commonwealth up to federal suit.⁴⁸

"Under the Commission's rules, the party seeking preemption bears the burden of proving that the state commission has failed to act."⁴⁹ In making this determination, the Commission does not evaluate "whether the state agency's position is correct on the merits" by "sit[ting] as an appellate tribunal to review the correctness of state resolution" of interconnection disputes.⁵⁰ Instead, it is merely "an alternative forum" for resolution of such disputes when the state commission has explicitly failed to act.⁵¹

2. Time Warner Cannot Carry Its Burden of Demonstrating that the NCREA Has Failed to Act.

Time Warner claims that preemption is warranted because the NCREA has failed to act in two distinct respects: (1) by refusing to initiate an arbitration; and (2) by exceeding the statutory time frame in Section 252(b)(4)(C).⁵² Both arguments fail.

First, the NCREA has not refused to initiate an arbitration to resolve the interconnection dispute between Time Warner and Star. Nor has the NCREA failed to respond to any of Time Warner's litany of filings or refused to resolve a particular issue in the arbitration. The NCREA has carefully considered Time Warner's requests for arbitration and crafted a reasonable two-phased framework for proceeding through arbitration on the various and complicated issues

⁴⁸ *WorldCom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 & for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc.*, Memorandum Opinion and Order, CC Docket No. 00-218, 16 F.C.C.R. 6224, 6226-27 (Rel. Jan. 19, 2001).

⁴⁹ *ACS of Anchorage, Inc., & ACS of Fairbanks, Inc. Emergency Petition for Declaratory Ruling & Other Relief Pursuant to Sections 201(b) & 252(e)(5) of the Communications Act*, Memorandum Opinion and Order, WC Docket No. 02-201, 17 F.C.C.R. 21114, 21117 (Rel. Oct. 22, 2002).

⁵⁰ *Global NAPS*, 291 F.3d at 833-34, 837.

⁵¹ *Id.* at 837.

⁵² *See* Preemption Petition at 11.

presented in this matter.⁵³ The NCREA (either directly or through its appointed arbitrator) has acted on Time Warner’s arbitration petition by issuing 25 orders relating to various aspects of the proceedings as to Time Warner’s petition for arbitration and consolidating Time Warner’s petition with Star’s 252(f)(2) petition pursuant to Section 252(g). If not for the interruption caused by Time Warner’s Preemption Petition, the NCREA would be actively moving toward resolution of the consolidated matter right now.

In its Preemption Petition, Time Warner alleges that the NCREA has “unequivocally expressed the intent not to act” on Time Warner’s pending arbitration petition.⁵⁴ This allegation is patently false—nowhere has the NCREA unequivocally stated an intention not to act to resolve this interconnection matter. Indeed, the controlling NCREA Order contemplates that arbitration of the interconnection agreement will take place as soon as the Authority rules on Star’s Section 251(f)(2) petition.⁵⁵ The NCREA’s conduct in this case can hardly be described as a failure to respond or incomplete action. This case is unlike *WorldCom*, where the state commission expressly refused to apply controlling federal law to resolve an interconnection dispute, for fear of waiving the state’s sovereign immunity and opening the state up to liability. It is also unlike *Starpower* and *Northland*, where the state commissions explicitly declined to take any action on the arbitration because they were uncertain of the proper interpretation of the underlying federal law. Instead, the NCREA has expressed its clear intention to resolve the interconnection matters at hand in due course, pursuant to the applicable federal law.⁵⁶

⁵³ Preemption Petition, Ex. 12, NCREA Order (Mar. 28, 2012)

⁵⁴ See Preemption Petition at 16-17 (citations and quotations omitted).

⁵⁵ Preemption Petition, Ex. 14, ¶ 6.

⁵⁶ See Preemption Petition, Ex. 14, NCREA Order, ¶ 6 (Apr. 2, 2013).

Second, the NCREA has not violated the deadline in Section 252(b)(4)(C). As a threshold matter, Time Warner’s argument “is at odds with judicial precedent regarding statutory deadlines. Statutory deadlines are generally considered directory, rather than mandatory.”⁵⁷ Indeed, courts are “most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake.”⁵⁸ Unlike Section 10 of the Act, which specifies a mandatory consequence if the Commission fails to act on a forbearance petition by the statutory deadline,⁵⁹ nothing in Section 252 suggests that Congress intended for a petition for arbitration to be immediately granted if the state commission does not act by the statutory deadline. Nor did Congress decide to automatically deprive the state commission from taking further action if the arbitration proceeding exceeds nine months. The state commission loses jurisdiction only if the Commission determines that a “failure to act” within the meaning of Section 252 has occurred.

Consistent with its flexible view of statutory deadlines, the Commission has excused the expiration of the deadline in Section 252(b)(4)(C) where the state commission has acted diligently. The Commission has stated that deadlines missed with respect to a request for arbitration or mediation may be excused where the state commission “has not been dilatory in its

⁵⁷ *Review of the Commissions Program Access Rules & Examination of Programming Tying Arrangements*, MB Docket No. 07-198, 25 FCC Rcd. 746, 798 (Rel. Jan. 20, 2010), *vacated in part on other grounds*, *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 722 (D.C. Cir. 2011); *see also Brock v. Pierce Cnty.*, 476 U.S. 253, 260, 262 (1986) (mere use of the word “shall” not enough to remove Secretary of Labor’s power to act after lapse of a deadline, and “[w]hen . . . there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act”); *Bhd. of Ry. Carmen Div., Transp. Commc’ns Int’l Union v. Pena*, 64 F.3d 702, 704 (D.C. Cir. 1995) (“Thus, absent a clear indication that Congress intended otherwise, we will deem a statutory deadline to be directory.”); 1A Sutherland Statutory Construction § 25:3 (7th ed.) (“Generally those directions which do not go to the essence of the issue at hand but which deal merely with procedures are not commonly considered mandatory. Likewise, if the act is performed but not in the time or in the precise manner directed by the statute, the provision will not be considered mandatory if the purpose of the statute has been substantially complied with and no substantial rights have been jeopardized.”).

⁵⁸ *Brock*, 476 U.S. at 260, 262.

⁵⁹ 47 U.S.C. § 160(c) (“Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) of this section within one year after the Commission receives it, unless the one-year period is extended by the Commission.”).

handling” of the underlying proceeding,⁶⁰ and where the delay is caused by uncertain threshold legal issues.⁶¹ Where the state commission oversees and issues frequent orders responsive to the parties’ dispute, the state commission can be found to have “carr[ied] out its responsibility” under Section 252.⁶² Indeed, where the state commission has “acted to complete the arbitration, and continues to devote extensive time and resources” to resolving the petition, “preemption of the [state commission’s] jurisdiction . . . would be extremely wasteful and inefficient.”⁶³ Preemption is not warranted where “further delay . . . would result from granting preemption” and would merely exacerbate the harm that the petitioning party claimed had already resulted from the protracted arbitration proceedings.⁶⁴

Preemption is not warranted here because the NCREA has been working diligently to resolve this proceeding. The Authority has been actively engaged in resolving various conditions precedent to the interconnection matter in related proceedings since 2006. The NCREA has acted “to complete its duties in a timely manner, but believed that it was unable to make a final determination with regard to [Time Warner’s] arbitration request solely because” of the initial proceedings regarding Time Warner’s petition for termination of Star’s Section 251(f)(1) rural exemption and the subsequent proceedings as to Star’s pending petition for suspension or modification under Section 251(f)(2), each of which was rightly viewed as an

⁶⁰ *ACS of Anchorage, Inc.*, 17 FCC Rcd. at 21119.

⁶¹ *Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T of Texas*, Memorandum Opinion and Order, WC Docket No. 09-134, 24 FCC Rcd. 12573, 12577 (Rel. Oct. 9, 2009) (“*UTEX I*”).

⁶² *Id.* at 12576.

⁶³ *UTEX Communications Corporation Petition for Preemption*, Memorandum Opinion and Order, WC Docket No. 09-134, 25 FCC Rcd. 14168, 14169-70 (Rel. Oct. 6, 2010) (“*UTEX II*”) (citation and quotations omitted).

⁶⁴ *Id.*

“obstacle to its conclusion of the arbitration proceeding.”⁶⁵ Despite these various legal issues, the NCREA has considered all of Time Warner’s filings, including its requests for arbitration, reconsideration, and motions related to the associated Section 251(f) proceedings. It has issued a total of 25 orders in this docket and consolidated the arbitration with Star’s suspension petition pursuant to its Section 252(g) authority. The NCREA even denied Star’s request that arbitration of the interconnection matter be held in abeyance until the Section 251(f) matter was resolved, instead setting forth a reasonable two-phased procedural schedule.⁶⁶ Under the Commission’s precedent, the NCREA’s diligence does not warrant preemption.

Indeed, the NCREA has demonstrated its diligence throughout this entire proceeding:

- The NCREA made a final decision on Time Warner’s first petition for arbitration within 5 months. *See* Preemption Petition, Exs. 1 & 3.
- The NCREA ruled on Time Warner’s request for reconsideration in 3 months. *See* Preemption Petition, Exs. 4 & 5.
- The NCREA requested comments on next steps less than 3 months after the district court’s ruling.
- The NCREA consolidated the proceedings and appointed an arbitrator only days after the filing of reply comments. *See* Preemption Petition, Ex. 7.
- The NCREA granted Time Warner’s request to terminate phase 1 of the proceeding 7 months after Time Warner filed its motion to terminate. *See* Preemption Petition, Exs. 8 & 9.
- The NCREA consolidated Star’s suspension petition with Time Warner’s petition for arbitration 1 month after Star filed its petition. *See* Preemption Petition, Exs. 10 & 12.
- The arbitrator ruled on Time Warner’s motion to dismiss Star’s suspension petition within 7 months. *See* Preemption Petition, Exs. 11 & 13.
- The NCREA reviewed the arbitrator’s decision 6 months later. *See* Preemption Petition, Exs. 13 & 14.
- The NCREA denied Time Warner’s request for reconsideration 2 months after it was filed. *See* Preemption Petition, Exs. 15 & 16.

⁶⁵ *UTEX I*, 24 FCC Rcd. at 12577.

⁶⁶ Preemption Petition, Ex. 7, NCREA Order, ¶ 4 (Jan. 27, 2010).

By promptly deciding all of these issues, the NCREA has demonstrated that it can timely complete the arbitration if given the opportunity.

Much of the delay in completing the consolidated proceeding is attributable to Time Warner's delaying tactics "rather than a failure of the [NCREA] to act."⁶⁷ Time Warner's gamesmanship has already caused substantial delay in the resolution of its own request for arbitration. Since Star filed its Section 251(f)(2) petition, which was consolidated with Time Warner's arbitration petition on April 2, 2013, Time Warner has continually delayed the NCREA's proceedings, filing a motion to dismiss Star's suspension petition, a petition for reconsideration of the NCREA's decision on its motion to dismiss, and this Preemption Petition. These actions have greatly delayed proceedings before the NCREA and prevented resolution of the parties' underlying interconnection dispute. Time Warner's delaying tactics appear to be part of a strategy to frustrate the NCREA's ability to complete the arbitration so it can gin up unreasonable delay and move on to what it perceives as a more favorable forum. If, however, Time Warner had allowed the two-phased arbitration to proceed, the NCREA by now could have addressed Star's suspension petition and resolved the arbitration. To grant Time Warner's Preemption Petition now based on the NCREA's alleged failure to complete the arbitration by the statutory deadline would unfairly reward Time Warner for delaying the proceedings before the NCREA in a blatant attempt at forum shopping.

Granting Time Warner's preemption petition would also result in a waste of Commission resources. Even if the FCC were to grant the petition and find in Time Warner's favor in any ensuing arbitration proceeding, Star's obligation to interconnect with Time Warner would be far from certain. As explained below, the final interconnection agreement between Time Warner

⁶⁷ *UTEX I*, 24 FCC Rcd. at 12577.

and Star depends significantly on the outcome of Star’s Section 251(f)(2) petition. An FCC-approved interconnection agreement could be overtaken if the NCREA later decides to suspend or modify some or all of Star’s interconnection obligations pursuant to Section 251(f)(2). Prudence demands deference to the NCREA’s process under these circumstances. As the Commission noted in the *CRC Declaratory Ruling*, Congress “recognized the expertise of state commissions by leaving to the states determinations regarding exemptions, suspensions, and modifications pursuant to section 251(f) in the first instance.”⁶⁸

B. The Commission Cannot Preempt the NCREA’s Jurisdiction Because It Reasonably Decided to Adjudicate the Threshold Issue Presented in Star’s Petition for Suspension Before Time Warner’s Petition for Arbitration.

1. The NCREA Reasonably Decided to Proceed with Star’s Petition for Suspension Before Resolving the Arbitration.

The NCREA reasonably determined that the most efficient way to resolve the overlapping interconnection-related petitions from Time Warner and Star was to consolidate the matters into a single proceeding and act first on the Section 251(f)(2) petition. Under the Authority’s two-phased approach, after deciding whether to suspend or modify Star’s interconnection obligations under 252(b) and (c), the NCREA would then, if necessary, arbitrate an interconnection agreement between Star and Time Warner. In establishing this two-phased approach, the NCREA reasonably believed that the outcome of Star’s petition for suspension could greatly affect the related arbitration of the parties’ interconnection agreement. It therefore decided that the most efficient course would be to resolve the Section 251(f)(2) issues before conducting an arbitration proceeding under Section 252.

In particular, the NCREA reasonably believed that granting Star’s petition for suspension could moot some or all of Time Warner’s petition for arbitration. If the Section 251(f)(2)

⁶⁸ *CRC Declaratory Ruling*, ¶ 23, nn. 81-82.

proceeding results in the suspension of Star's obligation to provide the interconnection arrangements under 251(b) requested by Time Warner, then Star's only obligation would be to interconnect with Time Warner under Section 251(a). In that case, the NCREA would have no duty to arbitrate the underlying interconnection dispute because state commissions need not arbitrate disputes arising under Section 251(a) in "isolation."⁶⁹ As the Commission has explained, "the general interconnection obligation of section 251(a) . . . is [not] implemented through the negotiation and arbitration scheme of section 252."⁷⁰ This is because "only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed" with the state commission pursuant to section 252(a)(1).⁷¹ Thus, if the NCREA finds that Star is relieved of all of its Section 251(b) duties pursuant to Section 251(f)(2), then Time Warner's petition for arbitration will be moot because "the procedures of Section 252 are not applicable in matters involving Section 251(a) alone."⁷² The NCREA reasonably decided that the most efficient course would be to first resolve the threshold issue presented in Section 251(f)(2) petition before charging ahead with the arbitration.

At a minimum, the NCREA reasonably believed that the outcome of Star's suspension petition would materially affect the terms of any resulting interconnection agreement between the parties. Section 251(f)(2) provides for the "suspension or modification" of requirements

⁶⁹ See *CRC Declaratory Ruling*, ¶ 21 (explaining that its holding, that rural ILECs exempt from 251(c) interconnection obligations were still subject to state commission arbitration of interconnection agreements related to interrelated obligations arising from 251(a) and 251(b) in obligation).

⁷⁰ *CoreComm Communications, Inc., & Z-Tel Communications, Inc., v. SBC Communications, Inc., et al.*, File No. EB-01-MD-017, Order on Reconsideration, 19 FCC Rcd. 8447, 8454-55, ¶ 18 (Rel. May 4, 2004).

⁷¹ *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File & Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order, WC Docket No. 02-89, 17 FCC Rcd. 19337, 19341, n.26 (Rel. Oct. 4, 2002)

⁷² *CRC Declaratory Ruling*, ¶ 21.

arising under Section 251(b) or (c).⁷³ Star's petition requests relief from Section 251(b)'s number portability, dialing parity, access to rights-of-way, and/or reciprocal compensation requirements.⁷⁴ Time Warner has requested that Star negotiate an agreement providing for interconnection, number portability, access to rights of way, reciprocal compensation, and collocation.⁷⁵ It makes no sense to arbitrate these issues while the Section 251(f)(2) petition is pending because any relief that NCREA grants to Star from Section 251(b) will materially affect the terms of the interconnection agreement between Star and Time Warner. As such, deciding to first address the threshold issue in this matter—*i.e.*, the scope of Star's Section 251(b) obligations—prior to arbitrating its interconnection agreement with Time Warner was eminently reasonable because it will result in a more efficient arbitration proceeding.

2. The NCREA's Choice of Procedures Is Consistent with the Communications Act.

The NCREA's decision to consolidate the suspension and arbitration petitions is consistent with the Communications Act. The Act clearly permits the NCREA to consolidate proceedings under Sections 251 and 252 "in order to reduce administrative burdens" on all the parties involved in those proceedings, including the Authority itself.⁷⁶ When it enacted Section 252(g), Congress contemplated that consolidation of a Section 251(f)(2) proceeding with a Section 252 proceeding would result in efficiencies and decreased burdens for all the parties. Here, the NCREA has made a reasoned judgment that a consolidated proceeding is a more efficient use of resources. It has also reasonably determined that the best way to proceed in the consolidated proceeding is to first assess Star's Section 251(f)(2) petition and then consider Time

⁷³ 47 U.S.C. §251(f)(2).

⁷⁴ See Preemption Petition, Ex.1, Time Warner Petition for Arbitration, at 20-21 (Mar. 14, 2006); Preemption Petition, Ex. 1, Attachment 1, Letter from Time Warner to Star (Oct. 5, 2005).

⁷⁵ Preemption Petition, Ex. 1, Attachment 1; Preemption Petition, Ex. 1.

⁷⁶ 47 U.S.C. § 252(g).

Warner's petition for arbitration of any remaining interconnection matters. As the modification/suspension proceeding will likely decide threshold issues material to the later outcome of the arbitration, this procedural approach is both reasonable and practical.

Moreover, the NCREA's two-phased approach is consistent with other indications of Congressional intent in the Act. The plain language of the statute suggests that Congress intended for Section 251(f)(2) suspension issues to be decided sooner than any arbitration. Congress directed state commissions to resolve suspension petitions within 180 days,⁷⁷ but afforded state commissions a longer nine-month period to conduct arbitrations.⁷⁸ The shorter timeline to complete a suspension proceeding indicates that Congress believed suspension petitions should be dealt with by state commissions earlier than requests for interconnection arbitrations. It follows that where these proceedings are consolidated pursuant to Section 252(g), Congress intended that the state commission resolve the Section 251(f)(2) petition first, as it has a significantly shorter deadline, and then move on to the issues remaining in the arbitration.

Proceeding in this fashion was particularly reasonable here, as the applicable shot clocks began running around the same time. Time Warner claims that the arbitration clock started on January 31, 2012, while Star filed its suspension petition on February 29, 2012.⁷⁹ Because the NCREA knew that the statutory deadline to rule on Star's suspension petition would expire before the statutory deadline for completing the arbitration, the Authority reasonably decided to consider the suspension petition first, followed by the arbitration.

Finally, even if the NCREA's understanding of the interplay between Sections 251 and 252 were incorrect, the Commission does not "sit as an appellate tribunal to review the

⁷⁷ *Id.* § 251(f)(2).

⁷⁸ *Id.* §252 (b)(4)(C).

⁷⁹ *See* Preemption Petition Ex. 11, Time Warner Motion to Dismiss 26-27 (Mar. 23, 2012).

correctness of state resolution of such disputes.”⁸⁰ The Commission need not decide whether that NCREA’s procedural approach is “correct on the merits,” but instead may only determine whether the Authority has “failed to act” under Section 252(e)(5).⁸¹ The Authority has certainly not “fail[ed] to act” under the statute. As explained above, the NCREA has proceeded diligently and reasonably in this matter. Granting Time Warner’s Preemption Petition will only serve to further delay resolution of the interconnection dispute between Time Warner and Star.

IV. CONCLUSION

For the foregoing reasons, the Commission should deny Time Warner’s Preemption Petition and clear the way for the NCREA to move forward with its two-phased approach to resolving this matter.

Respectfully submitted,

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September 6, 2013

⁸⁰ *Global NAPS*, 291 F.3d at 837.

⁸¹ *Id.* at 833-34.